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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID GUNTHER,

Plaintiff and Appellant,

v.

JACK IN THE BOX, INC., et al.,

Defendants and Respondents.

G036469

(Super. Ct. No. 04CC07445)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Geoffrey T. Glass, Judge. Affirmed.

Law Offices of Morse Mehrban and Morse Mehrban for Plaintiff and
Appellant.

Law Offices of Phillip K. Fife, Phillip K. Fife and Ryan M. Craig for
Defendants and Respondents.

* * *

INTRODUCTION

Plaintiff David Gunther prevailed on one of his two claims for violation of the Unruh Civil Rights Act (Civ. Code, § 51), and the trial court awarded him statutory damages (*id.*, § 52, subd. (a)). Gunther then moved for recovery of attorney fees under

Civil Code section 52, subdivision (a). The trial court awarded Gunther attorney fees, but at a far lower amount than he requested. Gunther appealed.

Although the trial court erred by failing to award attorney fees based on the lodestar method, that error was caused by Gunther's failure to provide the court with the information needed to perform the lodestar calculation. Additionally, the trial court would have been acting within its discretion to reduce the lodestar calculation based on numerous factors. Therefore, we affirm.

STATEMENT OF FACTS

In July 2004, Gunther (who cannot walk and is therefore dependent on a wheelchair for mobility) sued the owners and operators of a Jack in the Box on West Ball Road in Anaheim, alleging two violations of the Unruh Civil Rights Act (Civ. Code, § 51).¹ In brief, he claimed the toilet seat cover dispenser in the men's restroom was placed too high on the wall for use by patrons in wheelchairs, and the failure to insulate the pipes under the sink in the men's restroom prevented him from washing his hands. Following a bench trial, the court found in favor of Gunther on the first cause of action (toilet seat cover dispenser), and in favor of defendants on the second cause of action (pipes under the sink). The court found Gunther suffered no actual damages, but that it was required to award him a minimum of \$4,000 in statutory damages (Civ. Code, § 52, subd. (a)). The court also found Gunther had failed to contact defendants before filing suit to seek a voluntary remedy of the conditions he contended had denied him free and equal access to defendants' restroom. Judgment was entered September 20, 2005.

Gunther filed a motion on October 21, 2005, seeking a total of \$29,070.80 in attorney fees and costs. The trial court granted the motion, but awarded Gunther only \$2,000 in attorney fees and \$393.78 in costs. Gunther appeals from the attorney fees award; he does not challenge the costs award.

¹ Before trial, Gunther dismissed a third cause of action for violation of the unfair competition law (Bus. & Prof. Code, § 17200).

DISCUSSION

A prevailing plaintiff in an action under Civil Code section 51 is entitled to recover attorney fees. (Civ. Code, § 52, subd. (a); *Engel v. Worthington* (1997) 60 Cal.App.4th 628, 632.) The amount of the fees to be awarded, however, is a matter within the trial court's discretion. (*Engel v. Worthington, supra*, at p. 632.)

Gunther argues the trial court erred by failing to calculate his attorney fees using the lodestar method. (*Serrano v. Priest* (1977) 20 Cal.3d 25.) We have found no published case applying the lodestar method to the calculation of attorney fees under Civil Code section 52, subdivision (a). (Defendants, for their part, fail to even address the application of the lodestar method in their appellate brief.) However, the general rule is that when a statute authorizes an award of attorney fees, without specifying any restrictions on how those fees are to be calculated, the lodestar method applies. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134-1136.) Civil Code section 52, subdivision (a) refers to attorney fees without providing any further indication how the Legislature intended the fees should be calculated. Therefore, we conclude the lodestar method applies to awards of attorney fees for violations of the Unruh Civil Rights Act.

The initial lodestar figure is based on a “careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.” (*Serrano v. Priest, supra*, 20 Cal.3d at p. 48.) That figure may then be enhanced or reduced due to numerous factors, including “(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the state would ultimately fall upon the taxpayers; (5) the fact that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved; [and] (6) the fact that the monies

awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed.” (*Id.* at p. 49, fn. omitted.) This list is not exclusive. (*Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 974.)

The appellate record does not reflect a calculation by the trial court of a reasonable fee using the lodestar method. Gunther, however, failed to provide the trial court with the information needed to perform the lodestar calculation. Gunther’s moving papers did not contain a “careful compilation” of the time spent by his attorneys. Gunther claims no attorney fees were sought for work performed in relation to the dismissed defendants and the dismissed claim for violation of the unfair competition law. The record clearly belies this contention. As but one example, Gunther sought recovery of attorney fees to “[p]rep and serve discovery” and to “[r]eview discovery answers” at a time when the only named defendant in the case was Gina Cook, who was dismissed before trial. Gunther’s moving papers did not fully and fairly compile the necessary information regarding the number of hours spent on work performed by his attorneys.

Gunther also failed to provide the trial court with information regarding the reasonableness of the fees charged. Gunther’s counsel stated in a declaration that his regular rate for legal services is \$375 per hour. Counsel also stated that rate had been upheld by the United States District Court for the Eastern District of California, but failed to provide a copy of any order determining that to be a reasonable fee. Counsel provided no support for the reasonableness of his fees, or those of the other attorneys and paralegals who worked on this case. Additionally, Gunther did not provide any information regarding the prevailing rates in the community. While claiming that “hourly rates awarded by California courts in public interest cases are usually substantial,” Gunther cited only nonpublic interest cases to support his contention.²

² *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976 involved a claim of sexual harassment by an employer, and *Children’s Hospital & Medical Center v.*

So, the trial court did not have before it the two pieces of information necessary to perform the lodestar calculation. The court's failure to award attorney fees based on the lodestar calculation, which it could not perform, was harmless error.

Even if the trial court had been provided with the information necessary to perform the lodestar calculation, it would not have abused its discretion in applying modifying factors to reduce the amount of attorney fees awarded. The court expressed its belief that the case was neither novel nor difficult. Because Gunther failed to provide a copy of the retainer agreement, as he was specifically directed to do, the court could not determine whether the case was truly a contingency case, or whether the attorney or the client would ultimately benefit from the fee award. Gunther's counsel provided no information from which the court could determine whether counsel was required to forego other employment due to this case. Finally, the court found Gunther had failed to seek a voluntary remedy by defendants before filing suit. Contrary to defendants' argument, this fact would not have justified a refusal to award any fees.³ It would, however, have properly been considered by the trial court as a factor to lower the ultimate award, since a request for voluntary compliance with the Unruh Civil Rights Act and the ADA might have resulted in appropriate accommodations without the need to pursue litigation. The trial court would have acted well within its discretion by reducing the lodestar calculation in light of the foregoing factors.

Bontá (2002) 97 Cal.App.4th 740 involved a claim by out-of-state hospitals against the California Department of Health Services seeking reimbursement of costs incurred in treating Medi-Cal beneficiaries.

³ Defendants argue that because the alleged Unruh Civil Rights Act violations were based on violations of the Americans with Disabilities Act (ADA), the ADA's requirement that a plaintiff provide a prelitigation notice in order to give the defendant an opportunity to cure the purported defect ought to be read into Civil Code section 51. Our Legislature knows how to draft a prelitigation notice requirement. It did not do so when originally enacting the Unruh Civil Rights Act, or when amending it in 1992 to specify that a violation of the ADA also violates Civil Code section 51. We reject defendants' assertion that such a requirement ought to be read into the statute.

Defendants argue the trial court should have awarded no attorney fees or costs. They, however, did not file a cross-appeal from the postjudgment order. Defendants' arguments that the trial court could or should have stricken the entire motion for attorney fees and costs because Gunther did not send a prelitigation notice, because the case should have been filed as a limited jurisdiction or small claims case, or because the costs were previously denied in connection with the dismissal of other defendants from the case, are therefore moot. (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439.)

DISPOSITION

The postjudgment order is affirmed. In the interests of justice, because defendants failed to address the main issue on appeal, but instead raised arguments relating to a cross-appeal that was never filed, all parties shall bear their costs on appeal.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.